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U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Radiant Technology, Inc.

Serial No. 74/305,777

Edward A. Pennington of Morgan & Finnegan for Radiant Technology, Inc.

Richard G. Cole, Trademark Examining Attorney, Law Office 104
(Sidney I. Moskowitz, Managing Attorney).

Before Simms, Seeherman and Hohein, Administrative Trademark Judges.

Opinion by Hohein, Administrative Trademark Judge:

An application has been filed by Radiant Technology, Inc. to register the designation "RADIANTPANEL" as a trademark for "household hot water baseboard heaters."¹

Registration has been finally refused under Section 23 of the Trademark Act, 15 U.S.C. §1091, on the basis that the

¹ Ser. No. 74/305,777, filed on August 20, 1992, which alleges dates of first use of November 6, 1989. Although registration was originally sought on the Principal Register, applicant amended the application to the Supplemental Register on August 20, 1993 in response to a final refusal on the ground of mere descriptiveness under Section 2(e)(1) of the Trademark Act, 15 U.S.C. §1052(e)(1).

designation "RADIANTPANEL" is not capable of distinguishing the applicant's goods.

Applicant has appealed. Briefs have been filed, but an oral hearing was not requested. We affirm the refusal to register.

It is essentially the Examining Attorney's position, as stated in his final refusal, that combining the generic terms "RADIANT" and "PANEL" into the designation "RADIANTPANEL" results in a "generic name for a significant COMPONENT of the applicant's baseboard heating units" which is thus incapable of distinguishing applicant's goods. In particular, the Examining Attorney notes that, as stated therein, applicant's advertising literature lists the principal "COMPONENTS" of its "HOT WATER BASEBOARD HEATING" product as: "RADIANTPANELS," which are "[m]ade of heavy gauge, high quality, extruded aluminum"; various "FITTINGS," which "permit easy access to [such] heating panels"; a "DISTRIBUTION MANIFOLD"; and "POLYETHYLENE CROSSLINKED TUBING". Applicant's literature also states, among other things, that "Radiantpanel is the most advanced concept in perimeter baseboard heating"; that "Radiantpanel provides superior comfort by warming you directly with radiant heat, just like the sun"; that "Radiantpanels are 1" deep, 5³/₈" high, and are available in varying lengths"; and that "Radiant heat[,] by nature, is energy efficient because it delivers higher levels of comfort at lower thermostat settings."

In addition, the Examining Attorney relies upon a heating trade publication, issued by the Hydronics Institute and

made of record by applicant, which on the first page thereof makes reference to "Radiant Panel Heating" as a type of hydronic heating system. Such reference, the Examining Attorney argues in his brief, clearly and unequivocally "indicates trade usage and recognition of the term sought to be registered in the GENERIC sense." Other evidence of trade usage and recognition is shown, according to the Examining Attorney, by the copies he made of record of four "prior registrations wherein the terms 'radiant panel' and 'radiant panels' have been used (as early as 1968) in a generic manner by ... other businesses to identify their specific heating units, or components thereof." Specifically, Reg. No. 853,215, issued on July 23, 1968, sets forth goods identified as "ELECTRIC RADIANT PANEL SPACE HEATERS"; Reg. No. 1,030,567, issued On January 20, 1976, includes such heating units as "RADIATORS; RADIANT PANELS; [AND] RADIANT HEATERS"; and Reg. Nos. 1,159,814 and 1,177,036, respectively issued to the same third party on July 7, 1981 and November 10, 1981, list goods described as "ELECTRIC HEATING UNITS OF ALL TYPES AND PARTS THEREFOR--NAMELY, ... RADIANT PANELS".

Moreover, as further support for his position, the Examining Attorney relies upon excerpts of "articles from DATATIMES INFORMATION NETWORK [which] show conclusively that within the heating industry, the term 'radiant panel' or 'radiant panels' is in extensive use to generically identify certain types of room or area heating sources." Such excerpts, the Examining Attorney maintains, "not only indicate that applicant is probably not only not the first to use the term, but certainly is not the

only one" and that "every such reference will be seen to refer to some type of radiant heating system in terms of a 'radiant' panel or panels as defining a specific TYPE of heat source."

The most pertinent of the excerpts of articles retrieved by the Examining Attorney from the "DATATIMES INFORMATION NETWORK" database are reproduced below in relevant part (**emphasis added**):²

"I'll use **radiant panel** heating, because it provides heat without circulating dust-borne pollutants like forced air does," Vos says.

Radiant panel heating circulates 125-degree water through tubes covered by a thin layer of light cement.

Art Botts is getting **radiant panel** heating on both levels of his Frank Lloyd Wright-style, hip-roofed home. -- Grand Rapids Press, July 18, 1993, at 11;

Radiant panel radiators put out usable heat at relatively low water temperatures. This means they are compatible with water-source heat pumps, solar hydronics and reset fossil fuel boilers, to name a few. Moreover, they are not inherently in conflict with low temperature distribution systems such as radiant floor heating

PHOTO: A European **radiant panel** and towel warmer match comfort, quality and aesthetics. -- Contractor, February 1, 1991, at 35;

² Although forming part of the record, we have given no consideration to those excerpts which refer to "radiant panel test," "radiant panel tests" or "radiant panel flammability tests". Such references are considered irrelevant and immaterial inasmuch as a "radiant panel test," which the page from the Dictionary of Architecture and Construction made of record by the Examining Attorney defines at 393 as "[a]n ASTM standard method of test for the surface flammability of a material, using a radiant heat source," appears to have nothing to do, in and of itself, with household heating systems of any kind.

Electric baseboard units, quartz and ceramic heaters are all "resistance heaters" and all produce exactly the same amount of heat from each kilowatt-hour of electricity they use. So does an electric toaster, iron, furnace, **radiant panel**, infrared bulb or

stove element, for that matter. -- Toronto Star, March 10, 1990, at E10; Ottawa Citizen, March 10, 1990 at D2; and Edmonton Journal, January 20, 1990, at F2;

With the sound of the voice, a **radiant panel** above or below the work surface allows adjustment of the work station temperature -- Chicago Tribune, July 9, 1989, Home, at 12;

Among its features was a "**radiant panel** heating system," consisting of a small furnace in the ceiling of the utility room that pushed hot air across the metal ceilings of the other rooms -- Dallas Morning News, March 13, 1989, at 1C;

The building will feature **radiant panel** heating -- Ottawa Citizen, January 23, 1989, at A20;

The sun's radiated energy does heat the earth and the things on it when it comes in contact with it. The electric **radiant panel** works the same way. The radiated energy from the panels heat the objects in the room including you. -- Calgary Herald, January 7, 1989, at D2; and

Bob Haynie, technical research engineer with Arkansas Power and Light, listed four types of electric space heaters: Quartz-infrared, fan forced, wound wire radiant and a **radiant panel** that resembles a picture when it's hung on the wall. -- Arkansas Gazette, February 8, 1985, at 1E.

Finally, we note that the Examining Attorney has made of record a page from the Dictionary of Architecture and Construction which at 393 defines "radiant heating system" as

"[a] system for heating a room or space by means of heated surfaces (such as **panels** heated by the flow of hot water or electric current) which provide heat primarily by radiation" (**emphasis added**). In addition, we judicially notice the following pertinent definitions from Webster's New World College Dictionary (3d ed. 1997) at, respectively, 975 and 1107 (**emphasis added**):³

"**panel**," which among other things is defined as "2 a section or division of a wall, ceiling, or other surface; specif., ... b) a flat piece, usually rectangular, forming a part of the surface of a wall, door, cabinet, etc., and usually raised, recessed, framed, etc. c) a similar **piece** used for enclosing or covering something or **serving as a light diffuser, a built-in heating element in space heating**, etc. ...";

"**radiant**," which is listed, inter alia, as meaning "4 **issuing (from a source) in or as in rays; radiated [radiant energy]**"; and

"**radiant heating**," which is set forth as "**a method of heating a space by means of radiation, as from electric coils, hot-water or steam pipes, etc. installed in the floor or walls.**"

Similarly, The Random House Dictionary of the English Language (2d ed. 1987) at 1401 and 1592 respectively provides the following relevant definitions (**emphasis added**):

³ The Board may properly take judicial notice of dictionary definitions. See, e.g., *Hancock v. American Steel & Wire Co. of New Jersey*, 203 F.2d 737, 97 USPQ 330, 332 (CCPA 1953) and *University of Notre Dame du Lac v. J. C. Gourmet Food Imports Co., Inc.*, 213 USPQ 594, 596 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

"**panel**," which is defined, inter alia, as "**1. a distinct portion, section** or division of a wall, wainscot, ceiling, door, shutter fence, etc., **esp. of any surface** sunk below or **raised above the general level** or enclosed by a frame or border";

"**panel heating**," which is listed as the "**heating of a room or building by means of** wall, ceiling, floor, or **baseboard panels containing heating pipes** or electrical conductors";

"**radiant**," which among other things is defined as "**3. Physics emitted** or propagated

by radiation"; and

"**radiant heating**," which is set forth as
"1. the means of heating objects or persons
by radiation in which the intervening air is
not heated. 2. **a system for heating by
radiation from a surface, esp. from a surface
heated by means of electric resistance, hot
water, etc.**"

Applicant, however, maintains that its goods are generically known as "heaters" or "heating units" and that the Examining Attorney has failed to show otherwise. In particular, applicant insists that, "[c]ontrary to the examining attorney's assertion, the mark RADIANTPANEL is not used by the industry as a common descriptive or generic term." As support for its position that the designation "RADIANTPANEL" is capable of distinguishing its household hot water baseboard heaters, applicant refers to a heating trade publication (© 1992), issued by The Hydronics Institute, in which "commercially available heating units of the same type as the applicant's goods ... are referred to ... as 'baseboards', 'hydronic heating systems', and 'radiators', but not as 'radiant panels'." Thus, according to applicant:

[I]t is clear that there are several other, more apt terms for "describing" Applicant's goods. The fact that other terms are available (and in fact are more prevalent) militates against the examining attorney's supposition that RADIANTPANEL cannot be "capable of distinguishing Applicant's goods from those of others.

Applicant also relies upon a product brochure (© 1988) it made of record from one of its competitors, Embassy Industries, Inc., which refers therein to a "PANEL-TRACK" heating

product as a "HYDRONIC BASEBOARD". Inasmuch as "[n]either the word RADIANTPANEL nor the words RADIANT PANEL appear ... generically or descriptively on the brochure," applicant contends that such evidence, like the heating trade publication mentioned previously, "weighs against that of the examining attorney's, and is sufficient to show that the mark is capable of distinguishing the appellant's goods." Consequently, while admitting that "the heating system sold by Applicant includes a plurality of baseboard units that 'radiate' heat," applicant urges that the designation "RADIANTPANEL" has not been shown to be generic for its product.

Turning, therefore, to the standard for registrability, it is well settled that a designation must be capable of serving as an indicator of source in order for it to be registrable on the Supplemental Register. Whether a designation has the capacity necessary for registration on the Supplemental Register is determined by considering the meaning thereof as applied to the goods or services, the context in which it is used on the specimens filed with the application, and the likely reaction thereto by the average customer upon encountering the designation in the marketplace. See *In re Cosmetic Factory, Inc.*, 208 USPQ 443, 447 (TTAB 1980). "The test is not whether the mark is already distinctive of the applicant's goods [or services], but whether it is capable of becoming so." *In re Bush Brothers & Co.*, 884 F.2d 569, 12 USPQ2d 1058, 1059 (Fed. Cir. 1989), *citing* *In re Simmons Co.*, 278 F.2d 517, 126 USPQ 52, 53 (CCPA 1960). A generic designation, as noted in *H. Marvin Ginn Corp. v.*

International Association of Fire Chiefs, Inc., 728 F.2d 987, 228 USPQ 528, 530 (Fed. Cir. 1986), is incapable of registration on either the Principal Register or the Supplemental Register.

In the case of a generic designation, the burden is on the Patent and Trademark Office to show the genericness of the designation by "clear evidence" thereof. In re Merrill Lynch, Pierce, Fenner & Smith, Inc., 828 F.2d 1567, 4 USPQ2d 1141, 1143 (Fed. Cir. 1987). See also In re Gould Paper Corp., 834 F.2d 1017, 5 USPQ2d 1110, 1111 (Fed. Cir. 1987). As to the standard for evaluating genericness, the Board in In re Leatherman Tool Group Inc., 32 USPQ2d 1443, 1449 (TTAB 1994), noted that:

The test for determining whether a designation is generic, as applied to the goods [or services] set forth in an application or registration, turns upon how the term is perceived by the relevant public. See Magic Wand Inc. v. RDB Inc., 940 F.2d 638, 19 USPQ2d 1551, 1552-53 (Fed. Cir. 1991) and cases cited therein at 1553. Such perception is the primary consideration in a determination of genericness. See Loglan Institute Inc. v. Logical Language Group Inc., 962 F.2d 1038, 22 USPQ2d 1531, 1532 (Fed. Cir. 1992). As Section 14(3) of the Trademark Act, 15 U.S.C. §1064(3), makes clear, "[a] ... mark shall not be deemed to be the generic name of goods [or services] solely because such mark is also used as a name to identify a unique product [or service]"; instead, "[t]he primary significance of the ... mark to the relevant public rather than purchaser motivation shall be the test for determining whether the ... mark [is or] has become the generic name of the goods [or service] on or in connection with which it has been used." Consequently, if the designation sought to be registered is understood by the relevant public primarily to refer to the class or genus of goods at issue, the term is generic. See H. Marvin

Ginn Corp. v. International Association of Fire Chiefs, Inc., *supra*. Evidence of the relevant public's understanding of a term may be obtained from any competent source,

including newspapers, magazines, dictionaries, catalogs and other publications. See *In re Northland Aluminum Products, Inc.*, 777 F.2d 1566, 227 USPQ 961, 963 (Fed. Cir. 1985).

Upon careful consideration of the entire record, we agree with the Examining Attorney that the designation "RADIANTPANEL" is a generic term for a significant component of applicant's household hot water baseboard heaters, namely, the radiant heating panels used therein. See, e.g., *Remington Products Inc. v. North American Philips Corp.*, 892 F.2d 1576, 13 USPQ2d 1444, 1448 (Fed. Cir. 1990) [omission of word "PERSONAL" from phrase "TRAVEL CARE" does not obviate generic descriptiveness of such phrase, which is "incapable of designating origin," for personal travel care products]. Clearly, a panel which radiates something, in this case heat, is a radiant heating panel, a radiant panel heater, or--most simply put--a radiant panel. Applicant's own product literature reflects the generic significance of the designation "RADIANTPANEL," referring to "RADIANTPANELS" as one of the major components of its baseboard heaters and stating that its "Radiantpanels are 1" deep, 5³/₈" high, and are available in varying lengths."

In addition, the heating trade publication furnished by applicant demonstrates that, in the context of baseboard hot water heating systems, the primary significance of the

terminology "RADIANTPANEL" is that of a generic designation since it refers therein to "Radiant Panel Heating" as one kind of hydronic or hot water radiant heating system. That such publication also refers generically to goods of the type sold by applicant by such terms as "baseboards," "hydronic heating systems" and "radiators," and that a brochure utilized by one of applicant's competitors does not use the term "RADIANTPANEL" or a variation thereof (such as "radiant panel" or "radiant heating panel") is not dispositive. Rather, such evidence is simply outweighed by the clear and unambiguous evidence of generic use in the heating systems trade which is disclosed by the third-party registrations and pertinent excerpts from the "DATATIMES INFORMATION NETWORK" of the phrases "radiant panel" and "radiant panels," which convey precisely the same meaning as the designation "RADIANTPANEL."

Finally, it is clear from the dictionary definitions that the purchasing public, including the general public as well as heating system contractors and retailers, would immediately understand that, when joined to form the designation "RADIANTPANEL," the individual words "RADIANT" and "PANEL" have a meaning identical to the meaning which ordinary usage would ascribe to those terms in combination. See, e.g., *In re Gould Paper Corp.*, supra at 1112 ["SCREENWIPE" for a "premoistened, antistatic cloth for cleaning computer and television screens" is incapable of being registered]; *Cummins Engine Co., Inc. v. Continental Motors Corp.*, 359 F.2d 892, 149 USPQ 558, 561 (CCPA 1966) ["TURBODIESEL" for "internal combustion engines" is

incapable of registration for diesel engines with exhaust-driven turbine superchargers]; In re Pennzoil Products Co., 20 USPQ2d 1753, 1758-60 (TTAB 1991) ["MULT-VIS" for "multiple viscosity motor oil" is generic and incapable of registration]; and In re Wickerware, Inc., 227 USPQ 970, 971 (TTAB 1985) ["WICKERWARE" for "mail order and distributorship services in the field of wicker furniture and accessories" is generic for "a central characteristic of appellant's services" and thus is incapable of registration]. There is simply nothing unique or incongruous about the combination, nor would it have any meaning other than, as plainly shown by the third-party registrations, the relevant "DATATIMES INFORMATION NETWORK" excerpts, the portion of trade publication cited by the Examining Attorney and the applicant's own product literature, generically signifying a radiant panel heating component of applicant's household hot water baseboard heaters.

Accordingly, because the designation "RADIANTPANEL" has been demonstrated to primarily signify only a category or class which forms a principal component of applicant's goods, the Patent and Trademark Office has met its burden of establishing by clear evidence that such designation is generic and, thus, is incapable of registration.

Decision: The refusal under Section 23 is affirmed.

R. L. Simms

E. J. Seeherman

Ser. No. 74/305,777

G. D. Hohein
Administrative Trademark Judges,
Trademark Trial and Appeal Board